STATEMENT

of

Lucinda A. Low

on behalf of

The American Bar Association

before the

Committee on Foreign Relations

United States Senate

on the subject of

U.S. Ratification of the Inter-American Convention Against Corruption

May 2, 2000

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify before the Committee concerning U.S. ratification of the Inter-American Convention Against Corruption.

My testimony today is submitted on behalf of the American Bar Association. I am a former chair of the ABA Section of International Law and Practice, and currently serve on the International Section's Council and as the ABA's representative to the Inter-American Bar Association. With me is Stuart Deming, an officer of the Section of International Law and Practice and current co-Chair of an ABA Task Force on Standards on Corrupt Practices.

In 1997, during my chairmanship, the International Law Section of the ABA developed a report and recommendation on the Inter-American Convention Against Corruption. This report and recommendation, a copy of which is attached, calls on the United States and other OAS Member States to ratify the Inter-American Convention Against Corruption promptly, encourages ratification to be subject to minimal reservations and understandings, and urges prompt, full and consistent implementation by States Parties. Our recommendation was approved by the ABA House of Delegates in 1997 and thus constitutes official ABA policy. It is complemented by a 1998 ABA policy supporting U.S. ratification of the OECD Antibribery Convention, and an earlier policy urging the development of international standards to combat public corruption in international business transactions.

In my testimony today, I would like to focus principally on how the Inter-American Convention Against Corruption, as a regional instrument for the Western Hemisphere, fits into the emerging international standards against public corruption, and, within that context, why it is in the U.S. interest to participate in the Convention's regime. I would also like to address certain technical issues regarding ratification and implementation, and to answer any questions the Committee members may have about the Convention, or how it compares to U.S. law or other international instruments.

At the outset, I would like to commend the Committee for its support of U.S. ratification of the OECD Antibribery Convention in 1998. The OECD Convention is a highly-targeted instrument that addresses one principal issue Õ transnational bribery of foreign public officials Õ from the "supply", or bribe payers, side. Its focus is on disciplining business actors from major capital exporting countries and on establishing cooperation mechanisms for facilitating investigations and enforcing its provisions. Prompt U.S. ratification of the OECD Convention was a crucial step in putting its prohibitions into effect for a critical mass of countries in a record time frame. The OECD Convention furthered an important U.S. policy goal of establishing, in the countries that compete most strongly with the U.S. for major international projects, standards regarding the bribery of foreign public officials that parallel U.S. standards, as reflected in our Foreign Corrupt Practices Act (FCPA). The OECD Convention thus leveled the playing field for U.S. international business and set an international standard with which U.S. business could readily comply.

Now that the OECD Convention has entered into force and is being implemented, it is an

appropriate time to turn to ratification of the Inter-American Convention. For different reasons, U.S. ratification of this instrument is also strongly in the interests of the United States. And unlike the OECD Convention, which required amendments to the FCPA, the Inter-American Convention requires no changes to U.S. law.

Why is it in the U.S. interest to ratify the Inter-American Convention? To answer this question requires an understanding of how the Inter-American Convention differs from its OECD counterpart. The Inter-American Convention was borne of the first Summit of the Americas in Miami in 1994. It was recognized by the Summit participants that hemispheric economic integration, made possible by the shift in the region towards democratic governments and the establishment of free-market economies, required progress in the rule of law, transparency in administrative processes, and modernization of the state. Corruption Õ especially public corruption Õ undermines the development of democratic institutions and effective market mechanisms. It leads to misallocation of resources, and threatens the rule of law and political stability, adversely affecting the ability of countries to attract capital and foster economic development.

In many Latin American countries, public corruption is a "demand side" problem as much as a supply side problem. There is a need to strengthen civil service and the judiciary, reform laws and administrative processes (e.g., public procurement) to make them more modern, transparent and efficient, and to develop new systems of checks and balances, and watchdog institutions. Although some countries in the region are capital exporters, most are not. Thus, most of the OAS countries are not likely in the near to medium term to become parties to the OECD Antibribery Convention. More importantly, the OECD Convention approach, which focuses narrowly on the issue of transnational bribery and closely-related offenses, is not currently an approach Õ as the OAS Member States themselves have recognized Õ that adequately addresses the needs of the Latin American region. Rather, a broader-based effort, focusing on both the demand and the supply sides of public corruption, and on preventive measures as well as criminalization, is the more appropriate approach for the region as a whole at this time.

The Inter-American Convention reflects this broader, systemic approach to the issue of public corruption. In addition to requiring criminalization of a range of offenses (referred to as "acts of corruption") Õ domestic bribery, transnational bribery, illicit enrichment, among others Õ and providing for cooperation among signatory countries in investigations and enforcement, it requires countries to undertake reforms on the "demand" (or official government) side, in tax and customs administration, procurement systems, civil service reform, and the like Õ the so-called preventive measures. In addition, like the OECD Convention, it requires parties to cooperate in the investigation and prosecution of offenses, including in the areas of mutual legal assistance, extradition, and asset tracing and seizure. The Inter-American Convention can thus be seen as representing a kind of "to do" list for countries to combat public corruption as well as providing tools for effective enforcement of the relevant laws. In our view, it is precisely this kind of approach that makes sense for the region at this time.

Unlike some Inter-American treaties, the OAS Anticorruption Convention has garnered significant support from the countries of the region in a relatively short time. It has been signed by 26 OAS Member

States, and went into effect in 1997. Currently 18 countries are parties, including two countries Õ Argentina and Mexico Õ that are also parties to the OECD Convention. Despite this strong start, however, significant gaps remain in ratification and implementation.

Like the OECD Antibribery Convention, the Inter-American Corruption Convention's success depends on widespread ratification, implementation and enforcement by the relevant countries. And because the Inter-American Convention is significantly broader in scope than the OECD Convention, implementation and enforcement poses even a greater challenge for States Parties than they do in the OECD Convention context. Priorities must be established, especially in the area of preventive measures, and resources must be allocated. Under the best of circumstances, full implementation cannot be expected to happen overnight, but will occur over a period of years. In fact, the history to date is that although important steps have been taken by a number of countries, overall implementation has been spotty.

The United States, as the country most responsible for putting the issue of public corruption onto the hemispheric agenda and, among capital exporting countries, among the countries with the most at stake in the region in terms of promoting the rule of law and democratic institutions and developing market economies, needs to be a full participant in this implementation process. The United States does not need any implementing legislation of its own to participate in the Convention's regime; we have over the years enacted in some form all of the various items on the Convention's "to do" list. The United States does have an interest, however, in ensuring that the Convention is fully implemented and enforced by other countries of the region, in helping countries set priorities among the range of items on the "to do" list, in helping devise the best approach to a particular issue, and in keeping countries' feet to the fire if implementation and enforcement lag.

Without having ratified the Convention, however, it is unlikely the United States will have the ability to influence the implementation and enforcement process as fully as it would like. For example, the OAS is exploring the establishment of a monitoring mechanism for the Convention that will be open only to countries that have ratified the Convention. Even without such a mechanism, however, the views of non-ratifying countries on implementation and enforcement issues are unlikely to be accorded the same deference as ratifying countries. Moreover, for the United States, as one of the proponents of the Convention, to refuse to ratify the Inter-American Convention now would be taken as a sign by the other OAS Member States that the United States is not seriously committed to reform in this hemisphere.

For these reasons, U.S. ratification of the Convention makes sense. Ratification sends a strong message to countries of the region of a sustained commitment of the United States to this issue. It positions the United States to play a continued leadership role within the hemisphere on this issue. It supports our national goals of promoting democratization and economic development, and is an important complement to hemispheric integration. It also promotes the goal of universal ratification in the region.

Let me now turn to the questions of reservations, understandings and declarations (RUDs). As noted at the outset, the ABA's 1997 policy on the Inter-American Convention recommended that any ratifications be subject to minimal RUDs. Reservations, if excessive, can undercut the effectiveness of a

treaty. The Inter-American Convention, Article XXIV, permits reservations to specific articles provided the reservations do not conflict with the purpose of the treaty. To date, the reservations taken by ratifying countries have been minimal.

As we understand it, the Administration has proposed no reservations to the Convention, but has proposed several understandings, to Articles VII, VIII and IX. The proposed understanding with respect to Article VII would make clear that the United States does not intend to enact new laws to implement Article VII, since existing laws effectively reflect the "acts of corruption" required to be criminalized in that Article. The proposed understanding with respect to Article VIII similarly would clarify that the United States considers the Foreign Corrupt Practices Act to constitute adequate implementation of that Article's requirement to criminalize transnational bribery. We concur with both those understandings. We also note with respect to Article VIII that the Inter-American Juridical Committee of the OAS has clarified that facilitating payments may be excepted from a prohibition on transnational bribery consistent with the Convention.

The final proposed understanding relates to Article IX, illicit enrichment. The Convention permits countries to "opt out" of the criminalization obligations of Articles VIII and IX both, without the need to take a reservation, if criminalization would conflict with their constitutions or fundamental legal principles. As the State Department report accompanying the transmittal of the Convention to the Senate points out, Article IX of the Convention raises such a conflict in light of the constitutional presumption of innocence in Article IV of the U.S. Constitution. The Administration therefore recommends that the United States "opt out" of the criminalization obligation under Article IX, but declare its willingness to provide assistance to other countries in the investigation and enforcement of illicit enrichment cases consistent with U.S. domestic law, as required by the Convention.

The ABA policy does not explicitly address how the illicit enrichment issue should be handled. The accompanying report notes, however, that although the constitutional concern with our enacting a penal offense as specified in Article IX would be substantial, U.S. law currently contains measures that collectively function as the equivalent of such a provision for senior federal government officials. Specifically, when the financial disclosure obligations for senior federal officials under the Ethics in Government Act are coupled with the so-called "net worth method of proof" for criminal tax evasion under 26 U.S.C. § 7201, the result is the effective criminalization of illicit enrichment of these officials, enforced through the tax code. A similar result follows in other contexts when state and local disclosure regimes are taken into consideration.

Accordingly, one alternative to the U.S. exercising the "opt out" right built into the Convention (the exercise of which may prompt other countries to opt out of Article VIII or IX as well) might be for the United States to declare that the foregoing measures represent effective implementation of this obligation and that no further implementing legislation is contemplated. Were the United States to do so, care would need to be taken to ensure that such a step is not construed as shifting the burden of proof. For this reason, if the United States does not opt out of Article IX, its ratification should be subject to the understanding that the burden of proof under U.S. law would remain unchanged.

Again, thank you for the opportunity to testify and for your consideration of the Convention at this timely juncture. I would be happy to answer any questions the Committee may have.

AMERICAN BAR ASSOCIATION

Policy Adopted at the ABA's 1997 Annual Meeting

RESOLVED, That the American Bar Association supports the prompt ratification and implementation of the Inter-American Convention Against Corruption (Inter-American Convention) by the United States, by other members of the Organization of American States (OAS), and by other countries that are eligible to accede to the Inter-American Convention.

FURTHER RESOLVED, That the American Bar Association urges:

1) that such ratification be subject to minimal reservations and understandings; and

2) that such implementation be full, effective and consistent.

FURTHER RESOLVED, That, to assure consistency and effectiveness, the American Bar Association supports the criminalization of the bribery of foreign officials through the Inter-American Convention and through other instruments and fora in a manner consistent with the agreed upon common elements set forth in the Annex to the Organization for Economic Co- operation and Development's (OECD) Revised Recommendation of the Council on Combating Bribery in International Business Transactions and with the basic principles of the Foreign Corrupt Practices Act of the United States.

FURTHER RESOLVED, That the American Bar Association supports efforts by the OECD and its member countries to promptly carry out, fully implement, and actively enforce the OECD's Revised Recommendation of the Council on Combating Bribery in International Business Transactions in a manner that effectively deters foreign corrupt practices in the conduct of international business.